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buy the quantity of the goods ordinarily required by the business; or is his promise merely to buy from the vendor if he buys at all, a promise which is broken only by buying from someone else? It was held in a New York case[12] that a vendee, having promised to buy all the coal his steamships required for one year was liable for the coal even though he sold his steamships and went out of the business. On the other hand a Pennsylvania case[13] decided that a vendee who promised to buy all the coal he should need for his mill for a certain time did not break his contract by ceasing to use coal on the discovery of gas on the premises. The view that the only obligation of the vendee is to refrain from buying the commodity from anyone other than the vendor is satisfactory from the standpoint of mutuality, for such a promise is sufficient detriment to be good consideration for the vendor's promise; but when it is considered that certainty, no less than mutuality, is necessary to establish the validity of this type of contract, the view taken in the New York case seems to be the correct one. If it is granted that a contract is certain as to quantity because that quantity is ascertainable, it would seem to follow that the parties should be bound by that quantity,—the quantity which was in the contemplation of the parties when they contracted and which was fixed by the ordinary needs of an established business.

L. H. McK.

THE EXCLUSION OF A COMMODITY FROM TRANSPORTATION IS A CLASSIFICATION AND REGULATION UNDER INTERSTATE COMMERCE ACT.—The jurisdiction of the Interstate Commerce Commission is a question which has frequently been before the courts for determination. But in a recent case there was presented to the Supreme Court of the United States for the first time the question whether under the powers granted by the Interstate Commerce Act the Commission had jurisdiction to determine the reasonableness of the proposal of the railroads to exclude from shipment a commodity which had been transported for many years.[1] The Director General of Railroads had issued an order[2] cancelling the

[12] Wells v. Alexandre, *supra*. See also: Fertilizer Co. v. Phosphate Co., *supra*. Hickey v. O'Brien, *supra*.

[13] McKeever, Cook & Co. v. Canonsburg Iron Co. 138 Pa. 184, 20 Atl. 938 (1888). See also: Drake v. Vorse, *supra*, and note on Hickey v. O'Brien in 14 Harvard Law Review 150.

[1] Director General of Railroads, et al., v. The Viscose Company, U. S. Supreme Court Advance Opinions, decided Jan. 3, 1921.

[2] The order was issued on Jan. 21, 1920, under authority conferred by the Federal Control Act (40 Stat. 451, 456). This same Act took away from the Commission the power to suspend classifications or regulations when issued by the President; but the power over them after hearing remained, and the power to suspend was restored when the Transportation Act of 1920 (41 Stat. 456, 487) became effective. The action of the Director General of Railroads, under consideration in the principal case, may, therefore, be treated as if it had been taken by a carrier subject to the Act. Director General of Railroads, et al., v. Viscose Company, *supra*.

ratings on artificial and fibre silk as listed in the Consolidated Freight Classification No. 1,[3] and including the same articles in the list of commodities that would not be accepted for shipment. The Viscose Company, a producer of artificial silk, brought a bill in the District Court of the United States for the Eastern District of Pennsylvania asking for an injunction to restrain the Director General and certain carriers from enforcing this order.[4] The District Court issued the injunction and the defendant carriers appealed to the Circuit Court of Appeals for the Third Circuit. This court certified to the United States Supreme Court the following question:

"Did the District Court have jurisdiction to decide the matter raised by the complainant's bill and thereupon to annul the said action of the Director General of Railroads and enjoin the carriers from complying therewith?"

The Supreme Court answered this question in the negative, holding that this matter was one falling plainly within the exclusive initial jurisdiction of the Interstate Commerce Commission.[5]

The content of Sections 1, 3, 6, 13 and 15 of the Interstate Commerce Act,[6] the construction of which was the point here at issue, is that railroads subject to the Act must establish reasonable rates, fares, charges, classifications, regulations and practices affecting transportation, and that the Commission may grant relief for anything done or committed in contravention of the Act.

It is clear, then, that if the order of the Director General that silk should not be accepted for shipment constituted a change in classification or regulation under the Commerce Act, jurisdiction in this case to determine the reasonableness of the order was vested in the Commission. The decision was that it did constitute a change in both classification and regulation. Justice Clarke, in his opinion, says: ". . . . . in attempting to make the proposed change . . . . . it was necessary that the published classification of rates should be withdrawn by change of the tariffs

[3] This consolidated classification, which became effective Dec. 30, 1919, superseded previous freight classifications of the various carriers, the principal of which were the Official, the Western and the Southern: see I. C. C., v. D. L. & W., 220 U. S. 235 (1911); Consolidated Classification Case, 54 I. C. C. 1 (1919).

[4] Viscose Company v. Hines, Director General of Railroads, et al., 263 Fed. 726 (1920).

[5] At about the same time the same question in a similar action came before the District Court for the Southern District of New York, which denied the injunction, and on appeal to the Circuit Court of Appeals for the Second Circuit, which reversed the decree by a decision of two to one: Cheney Bros., v. Hines, et al., 266 Fed. 310 (1920). Since in the Supreme Court in the principal case the decision was five to four, an odd situation is presented in that of the fourteen federal judges who have considered the question, seven have held each way.

[6] Act of 1887, as amended: 24 Stat. 379, 380; 34 Stat. 584, 586; 36 Stat. 539, 552; 41 Stat. 456, 487.

on file and that notice should be given, through rule or regulation, that the silk would not be accepted for shipment in the future. Thus the supplement involved a change in the contents of previously filed classification lists and in a rule or regulation of the carriers. Classification in carrier rate-making is grouping,— the associating in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates. To exclude a commodity from all classes is classification of it in as real a sense and with as definite an effect as to include it in any one of the usual classes. To strike artificial silk from the first class and include it in the 'prohibited list' which, for any cause, the carrier refuses to accept as freight, classifies it and sets it apart in a group subject to special treatment,[7] as much as if it had been changed to the second class. We cannot doubt that the 'exclusion' in this case was an attempted 'classification,' and that the proposed change in Rule 3[8] was an attempted change of regulation, applicable to artificial silks, and that when challenged by the shipper the reasonableness of both presented a question for decision within the exclusive initial jurisdiction of the Interstate Commerce Commission."

The decision is an important one. Prior to this case, the Commission itself had asserted its authority to pass upon the reasonableness of the exclusion of certain commodities from shipment.[9] At the same time the courts had not hesitated to grant

[7] A denial of classification and class rates to a commodity in the Consolidated Freight Classification does not of necessity permanently deny freight transportation to the article. Where no class rate is established for a given service, commodity rates may be published, this being the general practice when no established class rate constitutes an appropriate charge for the service. For principles regarding the propriety of commodity rates see Rule 7*a* of Tariff Circular No. 18-A, revised by order of the Interstate Commerce Commission, effective March 31, 1911; James & Abbott Co. v. B. & M. Railroad, 17 I. C. C. 273 (1909); I. C. C. v. L. & N. Railroad, 227 U. S. 88 (1913). It is also permissible for a carrier to establish special rules and regulations in a more limited locality just as it may establish commodity rates. These rules and regulations are generally established in tariffs known as "Exceptions to the Official (or other) Classifications." As to the propriety of these, see Marx & Son v. I. C. Railroad Co., 36 I. C. C. 519 (1915); Ludowici-Caledon Co. v. Railroads, 39 I. C. C. 407 (1916); Pacific Coast Biscuit Co. v. Southern Pacific Co., 49 I. C. C. 115 (1918); Anheuser Busch Brewing Association v. Railroads, 52 I. C. C. 555 (1919). Commodity rates are recognized as a possibility in the principal case, but according to Justice Clarke's opinion it would make no difference in the decision of the case whether or not commodity rates were to be later published by the railroads.

[8] The section of Consolidated Freight Classification No. 1 which listed the commodities that would not be accepted for shipment.

[9] The exclusion of butter, eggs and dressed poultry from transportation by lake and rail was found unreasonable by the Commission and the class rates on those commodities restored: Lake-and-Rail Butter and Egg Rates, 29 I. C. C. 45 (1914). The Commission considered the reasonableness of a rule excluding from class rates "articles with postage stamps affixed" and held the

relief by injunction to shippers when a carrier attempted to exclude certain articles from shipment.[10] The Supreme Court has now settled the question definitely.

The principal case furnishes the first occasion where this construction of the Interstate Commerce Act, that "classification and regulation includes exclusion," has been upheld judicially.[11] Though novel, it is but a logical step in following the broad construction already given to the extensive powers of the Commission. Of the three duties devolved upon a carrier by law, (*a*) to serve (*b*) for reasonable compensation and (*c*) without unjust discrimination, the Commission's exclusive original jurisdiction over the latter two has been long established.[12] Is it other than natural that when the question was presented to the Supreme Court, the decision should uphold in the Commission jurisdiction of questions involving the scope of the first of these duties? The exclusive original jurisdiction of the Commission in matters arising under the Interstate Commerce Act has been repreatedly recognized as of utmost importance to the commerce of the country.[13] The court has here unquestionably followed the intention of Congress in so interpreting the Act[14]; and it has also recognized and met the demands of national commerce.[15] The decision is logical, modern and gratifying.

B. C. J.

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exclusion proper: Consolidated Classification Case, 54 I. C. C. 1 (1919). The Commission considered the exclusion of green hides in such a condition as to damage other freight and decided that until special equipment could be obtained the exclusion was proper: Western Classification Case, 25 I. C. C. 442 (1912).

[10] Southern Express Co. v. R. M. Rose Co., 124 Ga. 581, 53 S. E. 185 (1906); American Express Co. v. Beer, 104 Miss. 247, 61 So. 306 (1914), L. R. A. 1918B, 446, annotated; Bluthenthal v. Southern R. R. Co. 84 Fed. 920 (1898); Crescent Liquor Co. v. Platt, 148 Fed. 894 (1906); Royal Brewing Co. v. M., K., & T. T. T. Co. 217 Fed. 146 (1914).

[11] An analogy to the principal case is to be found in Tilley v. Norfolk & Western Ry. Co., 162 N. C. 37 (1913), where under state statutes as to intrastate commerce phrased similarly to the Interstate Commerce Act, the Supreme Court of North Carolina held that the reasonableness of the exclusion of loose hay from shipment was a matter for the State Corporation Commission and not for the courts. The analogy is uncertain, however, for here the carriers were really not excluding hay from shipment but were merely requiring it to be baled before being shipped, an action which involved an entirely different question.

[12] I. C. C. v. I. C. R. Co., 205 U. S. 452 (1910); B. & O. R. Co. v. U. S., 215 U. S. 481 (1910); Robinson v. B. & O., 222 U. S. 506 (1912); Morrisdale Coal Co. v. P. R. R., 230 U. S. 304 (1913); Texas & Pacific R. Co. v. American Tie Co., 234 U. S. 138 (1914); Loomis v. L. V. R. R., 240 U. S. 43 (1916). Wickwire Steel Co. v. N. Y. C. R. Co., 181 Fed. 316 (1910).

[13] Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907); Minnesota Rate Cases, 230 U. S. 352 (1912); P. R. R. v. Clark Coal Co., 238 U. S. 456 (1915); Loomis v. L. V. R. R., *supra*.

[14] House Report No. 923, 61st Congress, 2nd Session; Senate Report No. 355, 61st Congress, 2nd Session.

[15] The demand for uniformity of rule where there are conflicts between the views of different courts, or between the views of courts and of the Commission. This need is well illustrated by the decisions in the District Courts in the principal case and in that of Cheney Bros. v. Hines, et al., *supra*, one decree granting relief, the other denying relief.